



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 186 OF 2007 (117/2007 UR)

JACINTA WAIRIMU NJOROGE APPLICANT

AND

JULIA WANJIRU 1ST RESPONDENT

ALICE WAMBUI KARANJA 2ND RESPONDENT

AGATHA WANGECHI MUIRURI 3RD RESPONDENT

RAHAB MURINGE NDERI 4TH RESPONDENT

JECINTA MUMBI CHEGE 5TH RESPONDENT

(Application for stay of execution pending the lodging, hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Anga’wa, J) dated 9th May, 2007

In

H.C.C.C. No. 1418 of 2001)

RULING OF THE COURT

In the circumstances of the motion before us we are of the very clear view that there is no valid basis, legal or factual, upon which the Court can grant to the applicant Jacinta Wairimu Njoroge the order of stay under **Rule 5 (2) (b)** of the Rules of this Court. Of course it is now old hat that under that rule, the matters which the Court considers when deciding the issue of whether or not to grant an order are only two, namely, whether the appeal, if one has been lodged, or the intended appeal, where one has not been lodged, is an arguable one, i.e. one which is not frivolous, and secondly whether the success of such an appeal, were it to be successful, would have been rendered nugatory by the refusal to grant the order of stay. Of course, underlying the two principles is the assumption that the party applying for an order of stay has either appealed or intends to appeal. Even if an appeal is an arguable one and even if the success of the appeal would be rendered nugatory by a refusal to grant a stay, all those issues become irrelevant if no appeal is lodged or is intended to be lodged.

The motion we are dealing with was lodged in this Court on 25th July, 2007 and the record of the motion contains the proceedings in the High Court and the exhibits produced in that court. The applicant also has

obtained a copy of the judgment of that court. Yet upto the time of arguing the motion before us on the 16th October, 2008, no appeal had been lodged. M/s Nyang', for the applicant, informed us that she was not aware why the appeal had not been lodged. Yet the applicant has had in her possession the proceedings, the judgment and the exhibits since the filing of the motion more than one year ago. There cannot be an order of stay to a party who has not appealed or does not intend to appeal. We think this applicant does not intend to appeal. If she intends to appeal, she will have to apply for extension of time to enable her do so. She has not done so either.

On the usual principles, even if we assume in favour of the applicant that she has an arguable appeal, she has not satisfied us that the success of any appeal which she may bring will be rendered nugatory by our refusal to grant to her an order of stay. The land in dispute is still registered in her name. She has never lived on that land and there was no material at all placed before us that even if the land was to be transferred and registered in the names of the respondents, the respondents have any intention of disposing of the same. We are satisfied that the motion for stay and injunction dated 5th July, 2007 and lodged in the Court on 25th July, 2007 is for dismissal and we order that it be and is hereby dismissed with costs. Those are the orders of the Court.

Dated and delivered at Nairobi this 24th day of October, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.